Supreme Court, U.S.
FILED
96 47 JUL 8 1996
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term 1995

ROGER D. FLEENOR,

Petitioner,

v.

HEWITT SOAP COMPANY; BILL HATMAKER; KEN WALLET; RON HILL,

Respondents.

BOYD UNDERWOOD,
AGENT FOR THE HEWITT SOAP CO., INC.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

KELVIN L. BODDIE
Counsel of Record
120 West Second Street, Suite 636
Dayton, OH 45402
(513) 461-1399

Counsel for Petitioner

Appellate Printing Services • 2 South 6th Street • Richmond, VA 23219 • (800) 642-7789

51PP

QUESTION PRESENTED

1. Whether same-sex hostile work environment sexual harassment is prohibited under Title VII of the Civil Rights Act of 1964, as amended; and, if so, must the Plaintiff allege with specificity facts which support each and every element of his claim in order to survive a motion to dismiss or is a short and plain statement of the claim sufficient?

PARTIES TO THE PROCEEDING

1. Roger D. Fleenor (hereafter referred to as "Fleenor"), Plaintiff in the District Court and Petitioner.

2. Hewitt Soap Company (hereafter referred to as "Hewitt Soap"), Defendant in the District Court and Respondent.

3. Bill Hatmaker (hereafter referred to as "Hatmaker"), Defendant in the District Court and Respondent.

4. Ken Wallet (hereafter referred to as "Wallet"), Defendant in the District Court and Respondent.

5. Ron Hill (hereafter referred to as "Hill"), Defendant in the District Court and Respondent.

6. Boyd Underwood (hereafter referred to as "Underwood"), Defendant in the District Court and Respondent.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATION OF OPINIONS 2

JURISDICTIONAL STATEMENT 2

APPLICABLE STATUTE 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. There is conflict among several Circuit Courts of Appeals and confusion among the District Courtson the question of whether Title VII prohibits same-sex hostile environment sexual harassment. 6

II. The decisions below raise important questions regarding the standard of proof in a same-sex hostile environment sexual harassment case and the proper application of agency principles and respondeat superior liability. 9

A. Supreme Court Precedent 9

B. Analysis of District Court Decision 11

C. Anaylsis of Sixth Circuit Decision 13

CONCLUSION 19

APPENDIX .....

TABLE OF AUTHORITIES

CASES: PAGE

Ashworth v. Roundup Co., 897 F.Supp. 489 (W.D. Wash. 1995) 9

Baskerville v. Culligan International Co., 50 F.3d 428 (7th Cir. 1995) 8

Benekritis v. Johnson, 882 F.Supp. 521 (D.S.C. 1995) 9

Blozis v. Mike Raisor Ford, 896 F.Supp. 805 (N.D. Ind. 1995) 8

Boyd v. Vonnahmen, 1995 U.S. Dist. LEXIS 7542, 1995 WL 420040 (S.D. Ill., Mar. 29, 1995) 9

Barnes v. Costle, 183 U.S. App. D.C. 90, 561 F.2d 983 (D.C. Cir. 1977) 8

Conley v. Gibson, 355.U.S. 41(1957) 14,15,18

EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) 8,17

EEOC v. Walden Book Co., 885 F.Supp.1100 (M.D. Tenn. 1995) 8,12

Easton v. Crossland Mortgage Corp., 905 F.Supp.1368 (C.D. Cal. 1995) 8

Ecklund v. Fuisz Technology, Ltd, 905 F.Supp.335 (E.D. Va. 1995) 8

Fleenor v. Hewitt Soap Co., 81 F.3d 48 (6th Cir. 1996) 2

Fredette v. BVP Management Associates, 905 F.Supp. 1034 (M.D. Fla. 1995) 9

Garcia v. Elf Antochem North America, 28 F.3d 446 (5th Cir. 1994) 7

Goluszek v. Smith, 697 F.Supp. 1452 (N.D Ill. 1988) 5,9,11,12

Griffith v. Keystone Steel & Wire, 887 F.Supp. 1133 (C.D. Ill. 1995) 8

Hall v. Gus Construction Co., 842 F.2d 1010 (8th Cir. 1988) 17

Harris v. Forklift Systems, Inc., 510 U.S._, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) 6,7,10.11

Hirase-DOI v. U.S. West Communications, Inc. 61 F. 3d. 777 (10th Cir. 1995) 17

Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572, (10th Cir. 1990) 15,16

Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745 (4th Cir. 1996) 7

Joyner v. AAA Cooper Transmission, 597 F.Supp. 537 (M.D. Ala. 1983) aff'd, 749 F.2d 732 (11th Cir. 1984) 8

Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir. 1992) 15

McCoy v. Johnson Controls Services, Inc.,
878 F.Supp. 229 (S.D. Ga. 1995) 8

McWilliams v. Fairfax County Board of Supervisors,
72 F.3d 1191, (4th Cir. 1996) 7

Marrero-Rivera v. Department of Justice,
800 F.Supp. 1024 (D.P.R. 1992) aff'd
36 F.3d 1089 (1st Cir. 1994) 8

Mayo v. Kiwest Corp., 898 F.Supp. 335
(E.D. Va. 1995) 9

Meritor Savings Bank v. Vinson, 477 U.S. 57, 106
S.Ct. 2399, 91 L.Ed.2d 49 (1986) 6,9.10,11,
12,13,14,16

Myers v. City of El Paso, 874 F.Supp. 1546
(W.D. Tex. 1995) 9

Nogueras v. University of Puerto Rico,
890 F.Supp. 60 (D.P.R. 1995) 8

Oncale v. Sundowner Offshore Service, Inc.
83 F. 3d. 118 (5th Cir. 1996) 7

Polly v. Houston Lighting and Power Co.,
825 F.Supp. 135 (S.D. Tex. 1993) 8

Prescott v. Independent Life & Accident Ins. Co.,
878 F.Supp. 1545 (M.D. Ala. 1995) 8

Pritchett v. Sizeler Real Estate Mgt. Co.,
1995 U.S. Dist. LEXIS 5565, 19958
WL 241855, 67 Fair Empl. Prac. Cas.
1377 (E.D. La., Apr. 25, 1995) 8,9

Rabidue v. Osceola Refining Co., 805 F.2d
611 (6th Cir. 1986) cert. denied, 481
U.S.1041 (1987) 10

Raney v. District of Columbia, 892 F.Supp. 283
(D.D.C. 1995) 8

Roe v. K-Mart Corp., 1995 U.S. Dist. LEXIS 18211,
1995 WL 316783 (D.S.C., Mar. 28, 1995) 9

Sardinia v. Dellwood Foods, Inc., 1995 U.S. Dist. LEXIS 16073, 1995 WL 640502 (S.D. NY., Oct. 30, 1995) 8,11,12

Saulpaugh v. Monroe Community Hospital, 4.F.3d 134 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 1189 (1994) 7

Vandeventer v. Wabash Nat'l Corp., 867 F.Supp. 790 (N.D. Ill. 1988) 9

Williams v. District of Columbia, 916 F.Supp. 1 (D.D.C. 1996) 8

Wright v. Methodist Youth Services, Inc., 511 F.Supp. 307, (N.D. Ill. 1981) 8

STATUTES AND REGULATIONS:

42 U.S.C. @ 2000e 6,13

42 U.S.C. @ 2000e-2(a) 3

28 U.S.C. @ 1254(1) 3

TREATISES, JOURNALS AND MANUALS:

U.S. Merit Protection Board, Sexual Harrassment In The Federal Government, 1988 6

EEOC Compliance Manual *12*

No.

IN THE
Supreme Court of the United States

October Term 1995

ROGER D. FLEENOR,

PETITIONER,

v.

HEWITT SOAP COMPANY; BILL HATMAKER;
KEN WALLET; RON HILL;

RESPONDENTS

BOYD UNDERWOOD,
AGENT FOR THE HEWITT SOAP CO., INC.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Roger Fleenor respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

CITATION OF OPINIONS

The opinion of the United States Court of Appeals for the Sixth Circuit is officially reported as *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, (6th Cir. 1996) and is reproduced as App. A at pages A1 through A6 .

The December 21, 1994 opinion of the United States District Court for the Southern District of Ohio Western Division dismissing the Complaint is unofficially reported in 4 E.D.R. 225 (S.D. Ohio 1995), and is reproduced as App. B at pages B1 through B12 .

JURISDICTIONAL STATEMENT

Petitioner filed his Complaint in the Montgomery County Common Pleas Court on September 30, 1993. An Amended Complaint was filed in the Montgomery County Common Pleas Court on April 7, 1994 adding the Title VII claim. As a result, the matter was removed to the United States District Court for the Southern District of Ohio Western Division by Respondent, Hewitt Soap, on April 29, 1994. Each Defendant filed a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6).

On December 21, 1994 the District Court filed its Decision and Entry dismissing Petitioner's Title VII claim for failure to state a claim upon which relief could be granted under Fed. Rule Civ. P. 12(b)(6) and remanding the state law claims to the Court of Common Pleas for Montgomery County, Ohio.

Petitioner filed a timely notice of appeal with respect to the case on the merits.

On April 9, 1996 the Sixth Circuit Court of Appeals issued its opinion affirming for a different reason the District Court. No Petition for Rehearing was filed.

This jurisdiction of this court to review the judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. @ 1254(1).

APPLICABLE STATUTE

@ 703(a)(1) of Title VII, 42 U.S.C. @ 2000e-2(a):

It shall be an unlawful employment practice for an employer

. . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This is a case about same-sex hostile environment sexual harassment endured by Fleenor during the course of his employment at Hewitt Soap.[1] Petitioner, Roger Fleenor, is a healthy heterosexual male who was employed by the Respondent, Hewitt Soap, as a clean-up operator in April, 1988. In August of 1992, while being trained as a bleacher operator, Petitioner was subjected to repeated and unwelcomed sexual advances and harassment by Respondents Bill Hatmaker and Ken Wallet. On one occasion, in the presence of several employees including his supervisor, Hatmaker, in an effort to harass and intimidate Fleenor, said "give me some of that brown hole" and then proceeded to unzip his pants, pull out his penis and chase Fleenor around the shop room floor. On two separate occasions Hatmaker

---

[1] At all times relevant to this case, Hewitt Soap was a wholly owned subsidiary of American Safety Razor.

took a measuring tape and told Fleenor that he wanted to measure his dick to see how big it was. On two other occasions in the presence of his supervisor, Hatmaker took a ruler on one occasion and a shop tool on the other and stuck them up Fleenor's buttocks. In addition to the foregoing, Hatmaker engaged in a relentless campaign of sexually explicit and vulgar language directed at Fleenor, including on at least one occasion telling Fleenor "I want to fuck you" and on another telling Fleenor "I would like to take your pretty blonde hair wrap it around my hands and pull you down on me."

Wallet used sexual insults and slurs concerning Fleenor and Fleenor's girlfriend including drawing derogatory pictures and diagrams of Fleenor, asking Fleenor if his girlfriend's pussy was good and advising Fleenor that if he took him deer hunting in Pennsylvania all the men would want to fuck him. Despite Fleenor's repeated requests to Hatmaker and Wallet to stop, both continued on for several weeks.

From September of 1992 through December of 1993 Petitioner was subjected to further harassment and intimidation including removal of his time-card to prevent him from clocking in and out of work and threats to throw Petitioner over a ten foot fence all which created a hostile and offensive work environment in violation of Title VII.

As a result of the unwelcomed harassment and intimidation Petitioner suffered a total emotional shut-down and was diagnosed with Post-Traumatic Stress Disorder (PTSD). In February, 1994, his illness caused him to go on permanent disability leave from Hewitt Soap. Petitioner has not returned to Hewitt Soap and is still suffering from PTSD.

This case was originally filed in Montgomery County Common Pleas Court on September 30, 1993. An Amended Complaint adding the Title VII claim was filed in Common Pleas Court in April of 1994. The matter was removed by Respondent Hewitt Soap's counsel to the

United States District Court for the Southern District of Ohio, Western Division on April 29, 1994. The District Court granted the Defendants' motions to dismiss on December 21, 1994 and entered its Decision and Entry on said date dismissing the Title VII claim and remanding the state claims to the Court of Common Pleas. The District Court relied completely upon *Goluszek v. Smith*, 697 F.Supp. 1452 (N.D. Ill. 1988) for the conclusion that a male employee does not state a claim for relief under Title VII for hostile environment, sexual harassment, by alleging that he was sexually harassed by another male employee.

On appeal the Sixth Circuit court reviewed the same-sex sexual harassment issue under Title VII "de novo" and held, in a unanimous decision, that Petitioner failed to properly allege the respondeat superior liability element of the Title VII claim and therefore affirmed the District Court's dismissal of the Title VII claim. Although the Court of Appeals applied the elements of a hostile environment sexual harassment claim under Title VII to Petitioner's case, the Court refused to address the question of whether Title VII prohibits same-sex sexual harassment.[2]

---

[2] See pp 11 and 13 for analysis of Dist. Court and Sixth Circuit decisions.

REASONS FOR GRANTING THE WRIT

I. There is conflict among several Circuit Courts of Appeals and confusion among the District Courts on the question of whether Title VII prohibits same-sex hostile environment sexual harassment.

Employment discrimination on the basis of sex remains a matter of significant public concern. United States Merit Protection Board. Sexual Harassment in the Federal Government: An update (1988); See, Civil Rights Act of 1991, @ 202, 42 U.S.C. @ 2000(e). Same-sex sexual harassment has become a controversial issue within federal employment discrimination law which warrants this Court's review.

Title VII provides in pertinent part that "it is unlawful for an employer to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment . . . because of such individual's race, color, religion, sex, or national origin." Title VII invests in employees the right to work in an "environment free from discriminatory intimidation, ridicule and insult." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

In *Meritor*, this Court determined that a hostile work environment in violation of Title VII exists when the sexual harassment was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Meritor*, 477 U.S. at 67, 106 S.Ct. at 2405, (1986).

In 1993, this Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. __, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) refined and reaffirmed the standard for establishing a hostile work environment sexual harassment claim.

Harris provides that "Whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discrimi-

natory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required." *Harris* at 371.

This Court, however, did not address in *Harris*, nor since has it indicated whether same-sex hostile environment harassment is actionable under Title VII and if so, establish the pleading requirements and level of proof required in order for a plaintiff to prevail in his or her claim.

The primary issue presented by Fleenor and directly raised in the Respondents' motions to dismiss, is whether same-sex harassment is prohibited under Title VII.

Without clear direction from this Court, the Circuit Courts of Appeals have diverged on whether Title VII prohibits same-sex sexual harassment.

Two circuits, the Fifth and the Fourth have concluded that in a same-sex harassment case, a plaintiff either has no cause of action as indicated by the Fifth Circuit or must allege and prove the sexual orientation of the harasser in order to prevail in a same-sex case as provided by the Fourth Circuit. *Garcia v. Elf Antochem North America*, 28 F.3d 446 (5th Cir. 1994), *Oncale v. Sundowner Offshore Service, Inc.*, 83 F.3d 118 (5th Cir. 1996), *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, (4th Cir. 1996) and *Hopkins v. Baltimore Gas and Electric Company*, 77 F.3d 745 (4th Cir. 1996).

On the other hand, at least four other circuits, the 2nd, 7th, 9th, and DC Circuits have either held directly, implied, or stated in dicta that same-sex harassment is prohibited under Title VII. In *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 148 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 1189 (1994), the court provided that "harassment is harassment regardless of whether it is caused by a member of the same sex

or opposite sex." In *Baskerville v. Culligan International Co.*, 50 F.3d 428, 430 (7th Cir. 1995), Judge Posner noted that sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, men by other men, or women by other women would not also be actionable in appropriate cases." See also *Barnes v. Costle*, 183 U.S. App. D.C. 90, 561 F.2d 983, 990 N.55 (D.C. Cir. 1977) and *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515 (9th Cir. 1989) (court noted that plaintiff's were female and one harasser was female in sexual harassment case). In addition to the foregoing, federal district courts are deeply divided on this issue. No fewer than fifteen district court decisions addressed the viability of same-sex claims in 1995 alone. The majority of which determined that same-sex harassment was prohibited under Title VII.[3]

---

[3] The cases which prohibit same-sex harassment under Title VII include *Williams v. District of Columbia*, 916 F.Supp. 1,7 (D.D.C 1996); *Easton v. Crossland Mortgage Corp.*, 905 F.Supp. 1368, 1378-79 (C.D. Cal. 1995); *Ecklund v. Fuisz Technology, Ltd*, 905 F.Supp. 335, 337-39 (E.D. Va 1995); *Blozis v. Mike Raisor Ford*, 896 F.Supp. 805, 806, (N.D. Ind. 1995); *Raney v. District of Columbia*, 892 F.Supp. 283, 286-88 (D.D.C. 1995); *Nogueras v. University of Puerto Rico*, 890 F.Supp. 60, 62-63 (D.P.R. 1995); *Griffith v. Keystone Steel & Wire*, 887 F.Supp. 1133, 1135 (C.D. Ill. 1995); *EEOC v. Walden Book Co.*, 885 F.Supp. 1100, 1103 (M.D. Tenn. 1995); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F.Supp. 1545, 1549-51 (M.D. Ala. 1995); *McCoy v. Johnson Controls Services, Inc.*, 878 F.Supp. 229, 231-32 (S.D. Ga. 1995); *Polly v. Houston Lighting and Power Co.*, 825 F.Supp. 135, 137 (S.D. Tex. 1993); *Marrero-Rivera v. Department of Justice*, 800 F.Supp. 1024, 1027 (D.P.R. 1992), aff'd 36 F.3d 1089 (1st Cir. 1994); *Joyner v. AAA Cooper Transmission*, 597 F.Supp 537, 542 (M.D. Ala. 1983), aff'd, 749 F.2d 732 (11th Cir. 1984); *Wright v. Methodist Youth Services, Inc.*, 511 F.Supp. 307, 310 (N.D. Ill. 1981); *Sardinia v. Dellwood Foods, Inc.*, 1995 U.S. Dist. LEXIS 16073, 1995 WL 640502, at *6 (S.D. NY., Oct. 30, 1995); *Pritchett v.*

(continued on next page)

As a result of the foregoing, this Court should grant Certiorari to resolve the conflict among the federal courts with regard to whether same-sex harassment is prohibited under Title VII.

II. The decisions below raise important questions regarding the standard of proof in a same-sex hostile environment sexual harassment case and the proper application of agency principles with respect to employer liability.

A. Supreme Court Precedent

This Court held for the first time in *Meritor* that a sexual harassment claim can be based on a hostile or abusive work environment. In order to be actionable, the court determined that the discrimination must be based on sex and must be sufficient enough to effect a "term, condition or privilege" of employment within the meaning of Title VII.

(continued from previous page)

[3] *Sizeler Real Estate Mgt. Co.*, 1995 U.S. Dist. LEXIS 5565, 1995 WL 241855, at *2, 67 Fair Empl. Prac. Cas. 1377, 1378-79 (E.D. La., Apr. 25, 1995); *Boyd v. Vonnahmen*, 1995 U.S. Dist. LEXIS 7542, 1995 WL 420040, at *3 (S.D. Ill., Mar. 29, 1995); *Roe v. K-Mart Corp.*, 1995 U.S. Dist. LEXIS 18211, 1995 WL 316783, at *2 (D.S.C., Mar. 28, 1995).

Cases holding that Title VII does not protect against same-sex harrassement include *Fredette v. BVP Management Associates*, 905 F.Supp. 1034, 1037 (M.D. Fla. 1995); *Mayo v. Kiwest Corp.*, 898 F.Supp. 335, 337 (E.D. Va. 1995); *Ashworth v. Roundup Co.*, 897 F.Supp. 489, 494 (W.D. Wash. 1995); *Benekritis v. Johnson*, 882 F.Supp. 521, 525-26 (D.S.C. 1995); *Myers v. City of El Paso*, 874 F.Supp. 1546, 1548 (W.D. Tex. 1995); *Vandeventer v. Wabash Nat'l Corp.*, 867 F.Supp. 790, 796 (N.D. Ind. 1994) However, these courts all rely, directly or indirectly, upon the reasoning of *Goluszek v. H.P. Smith*, 697 F.Supp. 1452 (N.D. Ill. 1988) a decision that is fundamentally flawed in its reasoning. (See *Goluszek* analysis on pp 11).

Although instructive, the aforementioned standard provides limited guidance with respect to the necessary elements of proof for a successful hostile or abusive work environment sexual harassment claim.

The *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) *cert. denied*, 481 U.S. 1041 (1987) decision was the first circuit court case to apply the *Meritor* hostile work environment standard to a sexual harassment case. In *Rabidue*, the Sixth Circuit set forth the elements of a Title VII claim:

(1) the employee was a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) the existence of respondeat superior liability. *Rabidue*, 805 F.2d at 619-620.

In 1993, the Supreme Court in *Harris* significantly modified the fourth element in *Rabidue*.

In *Harris*, this Court addressed the question of whether a plaintiff in a hostile or abusive work environment Title VII claim must demonstrate, in order to prevail, that he or she suffered severe psychological injury as a result of the offensive conduct.

The *Harris* decision determined that "to be actionable as 'abusive work environment' harassment, conduct need not 'seriously affect (an employee's) psychological well-being' or lead the plaintiff to suffer injury". *Harris* 114 S.Ct 367 at p. 367.

Harris provided that no single factor is required in order to establish a hostile work environment sexual harassment claim, but rather stressed that a totality of the circum-

stances analysis must be undertaken.

Both *Meritor* and *Harris* were heterosexual hostile or abusive environment sexual harassment claims. In the instant case, the parties i.e., the victim and harassers are of the same sex and although not addressed in *Meritor* and *Harris* we believe the standards established and affirmed therein are applicable to the case at bar.

B. Analysis of District Court Decision

In the instant case, the District Court without analyzing Title VII, the legislative history, Supreme Court precedent or EEOC guidelines, dismissed plaintiff's Title VII claim under Federal Rule Civ. Pro. 12(b)(6) because the court believed that male against male sexual harassment was not actionable under Title VII and that an employee does not state a claim for relief under Title VII for hostile environment sexual harassment, by alleging that he was sexually harassed by another male employee. (App. B at B5) The District Court relied totally upon the reasoning in *Goluszek* for its conclusion. *Goluszek's* reasoning, however, is fundamentally flawed as is demonstrated below.

First, the support of its central proposition came from a law student and the student's note was written prior to the *Meritor* and *Harris* decisions which establish the applicable standard in a hostile work environment sexual harassment claim.

Second, and as provided in *Sardinia*, "there is nothing in the language of Title VII to support a finding that same-sex harassment is not prohibited . . . On the contrary, the language of the statute is non-exclusive, creating a 'broad rule of workplace equality,' *Harris*, 114 S.Ct. at 3471." *Sardinia* 69 F.E.P. cases at 709.

Third, *Goluszek* ignores Supreme Court precedent. As provided in *Sardinia*, "Meritor condemns 'unwelcome sexual advances that create a hostile working environment' in violation of Title VII. *Meritor*, 477 U.S. at 64. Without question, when a supervisor sexually harasses a subordinate

because of the subordinate's sex, the supervisor 'discriminates' on the basis of sex [citation omitted] when [Goluszek] departs from this principle, it departs from the Supreme Court. For example, when the Goluszek court notes that [i]n fact, Goluszek may have been harassed because he is a male, it is adhering to established Title VII principle, but in the same sentence, it veers off into new territory- 'but that harassment was not of a kind which created an anti-male environment in the workplace.' [citation omitted] *Sardinia* at p 709.

Fourth, "courts since *Meritor* have found it untenable to allow reverse discrimination cases but not same-sex sexual harassment cases to proceed under Title VII." *EEOC v. Walden Book Co.*, 885 F.Supp 1100, 1103 (M.D. Tenn. 1995).

Fifth, the injury resulting from same-sex harassment is no less severe than those created by harassers of the opposite sex.

Sixth, non-recognition of same-sex harassment is inconsistent with the EEOC Compliance Manual which provides in pertinent that:

> [t]he victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way. EEOC Compliance Manual, CCH, section 615.2 (b)(3).

Therefore, the question is not whether the victim and the harasser are of the same sex or what the sexual orien-

tation of the harasser is, but rather is whether the victim is being harassed because of his sex. For the foregoing reasons, we believe the district court erred in dismissing Petitioner's Title VII claim.

C. Analysis of Sixth Circuit Court of Appeals Decision

While the majority in *Meritor* suggested that Courts should look to agency principles in order to determine employer liability in a hostile environment harassment case, it declined to issue a definitive rule on the matter.

The majority did provide, however, that "Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. section 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor* 477 U.S. at 72.

As a result, the court determined that employers are not always automatically liable for sexual harassment by their supervisors. In *Meritor*, the Respondent brought an action against her former employer and her supervisor claiming that during her employment she had been subjected to sexual harassment by her supervisor.

In the instant case, Petitioner brought an action for same-sex sexual harassment against a coworker, Hatmaker, individually and as agent for Hewitt Soap, the coworker's immediate supervisor, Wallet, individually and as agent for Hewitt Soap, the employer, Hewitt Soap, and Ron Hill and Boyd Underwood as agents for Hewitt Soap.[4]

---

[4] See the Amended Complaint at App. C1 to C3 Boyd Underwood was named individually and as an agent for Hewitt Soap. By stipulation of the parties and order of the District Court issued May 27, 1994 Boyd Underwood was dismissed in his individual capacity.

The main harassers in the instant case were Hatmaker, Fleenor's coworker and Wallet, Hatmaker's immediate supervisor and close friend. These facts distinguish the *Meritor* case from the case at bar and raise important issues regarding the proper application of agency principles with respect to harassment activity by co-workers and supervisory personnel not previously addressed in *Meritor.*

The Sixth Circuit Court of Appeals after applying the Title VII hostile work environment elements to Petitioner's case concluded that "while it is by no means clear that the plaintiff properly alleged the third and fourth elements of his case, he fails on the last element, and we affirm the District Court's dismissal of his claim on that basis. (App. A at A3).

The element to which the Sixth Circuit was referring was the existence of respondeat superior liability. We believe, and the analysis which follows will demonstrate that the Sixth Circuit failed to properly apply the motion to dismiss standard of review and agency principles referenced in *Meritor.*

First, under *Conley v. Gibson*, 355 U.S. 41 (1957), this Court set forth the standard of review with respect to motions to dismiss. Conley rejected the notion that a plaintiff must set forth in his or her complaint specific facts to support its general allegations of discrimination. Instead, this Court provided that "The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Conley, 355 U.S. at p 47.

Therefore, the Sixth Circuit, while reviewing Petitioner's Second Amended Complaint, should have applied the very simplified "notice pleading" requirements referenced in Conley. In addition, the Sixth Circuit should

have viewed all the alleged facts in a light most favorable to the Petitioner while considering whether to dismiss Petitioner's case. The foregoing will demonstrate that the Sixth Circuit failed to apply the motion to dismiss standard set forth in Conley.

The Sixth Circuit indicated that it defined the standard for sexual harassment by co-workers and supervisors in a similar way. The Sixth Circuit provided that "when a plaintiff alleges harassment by co-workers, we have defined the test as whether the employer knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate action (App.at A3).

The Sixth Circuit Court erred however when it failed to recongize that Wallet as Hatmaker's supervisor was under agency principles the employer and any knowledge Wallet had with respect to Hatmaker's sexual harassment behavior, both past and present, was imputed to his employer. In addition, the Sixth Circuit erred by failing to take into consideration allegations in Petitioner's second amended complaint that both Hatmaker and Wallet were alleged to have harassed other males prior to harassing Petitioner, therefore failing to apply the knew or should have known standard to prior sexual harassment acts alleged by Petitioner.

In *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, (6th Cir. 1992), *cert. denied*, 506 U.S. 1041 (1992), a case referred to and relied upon by the Sixth Circuit, the court recognized that in appropriate circumstances an employer could be held responsible for sexual harassment even if it took immediate steps to stop the harassment if there were prior complaints against the harassers which the employer knew or should have known about but failed through its negligence or recklessness to discipline or terminate the harassers.

This proposition was more fully developed in *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d.

572, (10th Cir. 1990) a case which applied the agency principles discussed in *Meritor*.

In *Hirschfeld*, the Tenth Circuit outlined the agency principles to be applied in a hostile environment sexual harassment case where the harasser is not the immediate supervisor of the victim as in the case at bar.

The court provided that there are three alternative bases for holding an employer liable for an agent's hostile work environment sexual harassment. Under the Restatement (second) of agency, an employer is liable for any tort committed by an employee while acting in the scope of [his or her] employment. [citation omitted] [quotations omitted] *Hirschfeld* 916 F.2d at 575.

The Tenth Circuit referred to other sections of the Restatement which provided:

(a) A member is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(b) the master was negligent or reckless, or

(c) the servant purported to act or speak on behalf of the principle and there was reliance upon apparent authority, or he [or she] was aided in accomplishing the tort by the existence of the agency relative. *Id.* 916 F.2d 575-576.

Under subsection (b) of the above test, the question is whether Hewitt Soap knew or should have known of past sexual harassment activity by Hatmaker and Wallet and therefore was negligent or reckless in their failure to properly discipline Hatmaker and/or Wallet prior to the alleged sexual harassment of Fleenor.

In other words, Employer negligence in this context is defined as "failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew or in the exercise of reasonable care should have known." *Id.* 916 F.2d 576.

This is a standard which applies direct liability upon an

employer for its negligence or recklessness rather than derivative liability for respondeat superior. The Ninth Circuit Court of Appeals also adopted this standard *in EEOC v. Hacienda Hotel,* 881 F.2d 1504 (9th Cir. 1989).[5]

We believe the allegations in the Second Amended Complaint make a strong case for employer negligence or recklessness under this standard of review.

The Sixth Circuit failed to properly apply the knew or should have known agency standard with respect to Hatmaker's prior sexual harassment activity. The Second Amended Complaint alleges that Hatmaker had harassed others in the past and was known in his department as a harasser. (App. at C8). It further alleges that Hewitt Soap knew or should have known of the past harassment activity of both Hatmaker and Wallet and failed to take action regarding it prior to the attacks upon Fleenor. (App. at C8).

In addition, since Wallet was Hatmaker's supervisor and had the authority to discipline Hatmaker at anytime, as is evident by Exhibit A attached to the Second Amended Complaint, employer liability is clearly established since Wallet engaged in sexual harassment of other males in the past, observed Hatmaker on many occasions harassing Fleenor and did nothing to prevent it from occurring.

Although the Sixth Circuit suggested to the contrary, the Second Amended Complaint clearly alleges that Wallet also harassed Fleenor.

Paragraph ten provides that "Hatmaker and Wallet used sexually suggestive offensive and vulgar language in an attempt to threaten and intimidate Plaintiff." (App. C at C3).

In addition the Second Amended Complaint provided that Hatmaker and Wallet sexually harassed Plaintiff . . . by drawing derogatory pictures and diagrams of Plaintiff . . .

---

[5] See also *Hirase-DOI v. U.S. West Communications*, Inc. 61f. 3d. 777 (10th Cir. 1995 and *Hall v. Cus Construction Co.* 842 f.2d. 1010 (8th Cir. 1988).

making repeated sexual insults and slurs concerning Plaintiff . . . and making unwelcomed, uninvited sexual advances . . .(App. C at C5).

Defendant, Wallet, willfully, wantonly, and maliciously sexually harassed Plaintiff by making derogatory sexual comments about Plaintiff and Plaintiff's girlfriend. (App. C at C6).

Moreover, the record reflects that Wallet was present when Hatmaker harassed Fleenor and on a number of occasions encouraged and participated in the harassment activity.[6]

Therefore, the Sixth Circuit failed to address Hewitt Soap's negligence or recklessness as it relates to the past sexual harassment activity which was alleged in the Second Amended Complaint.

Finally, we do not believe that the law requires the level of specificity indicated by the Sixth Circuit,

"The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley 355 U.S. at 48.

---

[6] See Exhibit A to amended complaint where Wallet in disciplinary action against Hatmaker acknowledges being present during harassment (App. C12).

CONCLUSION

The issues presented raise important questions regarding federal employment discrimination law which we believe will have far reaching impact in this area.

Therefore, for the foregoing reasons, this Court should grant the petition and issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,
s/s Kelvin L. Boddie
Kelvin L. Boddie
Ohio Reg. #0029696
120 W. Second Street
STE. 636
Dayton, Ohio 45402
(513) 461-1399

Counsel for Petitioner

APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0116P (6th Cir.)
File Name: 96a0116p.06

No. 95-3045

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROGER D. FLEENOR,
Plaintiff-Appellant,

v.

HEWITT SOAP COMPANY, BILL HATMAKER, KEN WALLET, RON HILL,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

---

Decided and Filed April 9, 1996

Before: MERRITT, Chief Judge; CONTIE and BOGGS, Circuit Judges.

MERRITT, Chief Judge. Plaintiff, an employee of Defendant Hewitt Soap Company, appeals the District Court's dismissal of his claim for failure to state a cause of action. Plaintiff, a male, alleged that several male colleagues had taunted him with sexually explicit language and conduct, thereby creating a "hostile working

environment." He sought relief under Title VII for discrimination on the basis of sex. The District Court dismissed the claim on the grounds that same-sex sexual harassment claims are not cognizable under Title VII.

We find that plaintiff failed to assert that his employer was responsible for the alleged discrimination as required by Title VII, and we therefore affirm the District Court's decision for this reason. We need not reach the question of whether Title VII prohibits same-sex sexual harassment.

I. Facts

In April 1994, plaintiff, Roger Fleenor, filed a complaint against defendant Hewitt Soap Company and several other defendants who were employed by Hewitt. The complaint alleged that for a two-week period in August of 1992, he was subjected to "repeated and unwelcome sexual advances and harassment" by two co-workers, defendants Hatmaker and Wallet. He alleged specifically that defendant Hatmaker, inter alia, exposed his genitals to plaintiff, threatened to force plaintiff to engage in oral sex with him, and "stuck a ruler up Plaintiff's buttocks" against plaintiff's will. In September 1992, the company reprimanded Hatmaker for his behavior. J.A. at 34. The complaint also alleged harassment of a non-sexual nature, including the removal of plaintiff's time-card to prevent him from clocking in and out of work and threats to throw plaintiff over a fence, which created "an intimidating, hostile, and offensive work environment" until December 1993. Plaintiff's appeal is taken from the District Court's order dismissing with prejudice his Title VII claim and remanding to state court his state tort claims. J.A. at 39.

II. Discussion

In order to prevail on a claim of hostile environment sexual harassment under Title VII, we have said that an employee must allege and prove that:

(1) the employee is a member of a protected class;
(2) the employee was subject to unwelcomed sexual

> harassment . . . ; (3) the harassment complained of was based on sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive work environment . . . ; and (5) *the existence of respondeat superior liability.*

Rabidue v. Osceola Refining, Co., 805 F.2d 611, 619-20 (6th Cir. 1986) (emphasis added), *cert. denied*, 481 U.S. 1041 (1987). While it is by no means clear that the plaintiff properly alleged the third and fourth elements of his case, he fails on the last element, and we affirm the District Court's dismissal of his claim on that basis.

The use of the term "respondeat superior" in this area has created a certain amount of confusion that we wish to dispel before proceeding with our analysis. When the Supreme Court first recognized a cause of action for "hostile environment" sexual harassment in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), it declined to define a precise standard for employer liability under Title VII. Instead, the Court stated simply that "Congress wanted courts to look to agency principles for guidance in this area" and that this "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.* at 72. In *Vinson*, the alleged harassment was inflicted by a supervisor on his subordinate. This court, therefore, has looked to traditional agency principles--such as scope of employment and foreseeability--to determine employer liability under Title VII when a supervisor harasses a subordinate. *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 183-84 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992).

We have defined the standard for sexual harassment by co-workers and supervisors in a similar way. When a plaintiff alleges harassment by co-workers, we have defined the test as whether the employer "knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action."

Rabidue, 805 F.2d at 621. Although we erroneously referred to it as "respondeat superior," we later realized that "the term 'respondeat superior'--which connotes derivative liability--is an incorrect label for co-worker harassment cases, where the employer is directly liable for its own negligence." *Pierce v. Commonwealth Life Insurance Co.*, 40 F.3d 796, 804 n.11 (6th Cir. 1994). This understanding, that the employer is directly not derivatively liable, and the underlying "knew or should have known" standard, are consistent with the law in other circuits. *See, e.g., Hirschfield v. New Mexico Corrections Dept.*, 916 F.2d 572, 577 & n.5 (10th Cir. 1990); *Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010, 1015-16 (8th Cir. 1988); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421-22 (7th Cir. 1986). The standard is also consistent with the common law understanding of an employer's liability for the misconduct of employees.[1] This general standard applies also in supervisor cases, as Judge Boggs' opinion for the Court in *Kauffman*, supra, makes clear. There the court holds that the employer's liability must be "based on its failure to respond adequately and effectively to the problem *when it had notice of its supervisor's proclivities at an earlier date.*" *Kauffman*, 970 F.2d at 184 (emphasis added). This standard is one of failure-to-correct-after-notice or duty to act after knowledge of harm.

---

[1]The Restatement (Second) Torts § 317 (1965) reads:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others . . . , if the servant is upon the premises in possession of the master . . . , and the master knows or has reason to know that he has the ability to control his servant, and knows or should know of the necessity and opportunity for exercising such control.

See also Restatement (Second) of Agency §§ 213 and comment, 219 (1957) (master is not responsible for employee's conduct outside the scope of employment unless master is negligent or reckless).

In the case before us, the pleading is deficient with respect to defendant Wallet because it does not allege what he did to sexually harass plaintiff. The plaintiff appears to allege that one of his harassers, Mr. Wallet, is a supervisor and that therefore agency principles should apply. Mr. Wallet, however, was not plaintiff's supervisor, but a supervisor elsewhere in the company. Furthermore, regardless of whether we treat Mr. Wallet as a supervisor or a co-worker, the plaintiff's allegations with respect to him are not specific enough to satisfy even the loose requirements of notice pleading. The complaint does not attribute any specific statements or conduct to Mr. Wallet. The plaintiff is capable of stating specific facts where he claims that wrongful conduct actually happened, as he does regarding defendant Hatmaker, but the pleading does not give any hint as to what specific conduct Mr. Wallet engaged in and whether he is responsible as a supervisor or co-worker. Thus, the pleading does not establish employer liability as to Wallet's conduct.

As noted, the plaintiff is capable of pleading with the requisite specificity, as he demonstrates with his allegations regarding defendant Hatmaker. Hatmaker is a fellow worker. The standard is whether the company failed to correct after notice or "knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." *Rabidue*, 805 F.2d at 621. *See also Pierce*, 40 F.3d at 804; 29 C.F.R. § 1604.11(d). Here, the sexual conduct at issue occurred during a two-week period in August of 1992. The company reprimanded defendant Hatmaker in September of 1992, and, by plaintiff's own admission, the sexual conduct stopped. Even if the conduct alleged up to that time could support a claim under Title VII, the company's action was sufficient to stop it and to relieve itself of liability. The conduct alleged after that time does not state a set of facts that would establish sex discrimination under Title VII whether the employer knew about it or not. For these reasons, we AFFIRM the District Court's dismissal of the Title VII claim and the remand of the state claims to state court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 95-3045

ROGER D. FLEENOR,
Plaintiff - Appellant,

v.

HEWITT SOAP COMPANY, BILL HATMAKER
KEN WALLET, and RON HILL,
Defendants - Appellees.

Before: **Merritt,** Chief Judge;
Contie and **Boggs,** Circuit Judges.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio at Dayton.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Issued as Mandate: May 1, 1996 A True Copy.
COSTS: (Awarded to appellees)
Filing Fee ..... $
Printing ..... $ 159.99
Total ..... $ 159.99

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ROGER D. FLEENOR, :
:
Plaintiff :
vs. :
: Case No: C-3-94-182
HEWITT SOAP COMPANY, :
et al., :
:
Defendant(s) :

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

x **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff take nothing; that judgment is entered in favor of the Defendants and against the Plaintiff; that Plaintiff's Federal Claim is DISMISSED WITH PREJUDICE and that Plaintiff's State Law Claims are REMANDED to the Court of Common Pleas for Montgomery County, Ohio.

December 21. 1994
Date

Kenneth J Murphy, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROGER D. FLEENOR,	:	
	:	
Plaintiff,	:	
	:	Case No. C-3-94-182
vs.	:	
	:	JUDGE
	:	WALTER HERBERT RICE
HEWITT SOAP COMPANY, et al.,	:	
	:	
	:	
Defendants.	:	

DECISION AND ENTRY SUSTAINING IN PART AND NOT RULING UPON IN PART DEFENDANTS' MOTIONS TO DISMISS (DOCS. ##4, 7 AND 18); MOTION TO DISMISS OF FORMER DEFENDANT BOYD UNDERWOOD (DOC. #6) OVERRULED AS MOOT; JUDGMENT TO BE ENTERED IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFF, DISMISSING PLAINTIFF'S FEDERAL CLAIM WITH PREJUDICE AND REMANDING HIS STATE LAW CLAIMS TO THE COURT OF COMMON PLEAS FOR MONTGOMERY COUNTY, OHIO; TERMINATION ENTRY

This case originated in the Court of Common Pleas for Montgomery County, Ohio ("Court of Common Pleas"). When Plaintiff filed his initial complaint in that court, he set forth only claims arising under state law. However, when he filed an amended complaint in the Court of Common Pleas, he added a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000e et seq.[1] The Defendants then removed this litigation to this Court, pursuant to 28 U.S.C. § 1441(b), alleging that this Court had original, subject matter jurisdiction over Plaintiff's amended complaint, pursuant to 28 U.S.C. S 1331 (federal question jurisdiction).[2] See Doc. #1. After removing this litigation to this Court, the Defendants filed motions to dismiss all of the Plaintiff's claims. See Docs. ##4, 7 and 18. For reasons which follow, this Court concludes that the Plaintiff's single federal claim, a claim of sexual harassment under Title VII, must be dismissed. In addition, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims; therefore, the Court remands those claims to the Court of Common Pleas, without addressing the motions to dismiss as they relate to those claims.

According to Plaintiff's second amended complaint (Doc. #17),[3] the incidents which led to the filing of this litigation occurred in August, 1992.[4] At that time, Plaintiff was employed by Defendant Hewitt Soap Company ("Hewitt"). Defendants Bill Hatmaker ("Hatmaker"), Ken Wallet ("Wallet") and Ron Hill ("Hill") were also employed by Hewitt in August,

---

[1]Copies of Plaintiff's initial and amended complaint are attached to the Defendants' notice of removal (Doc. #1).

[2]Diversity of citizenship between the Plaintiff and all of the Defendants does not exist.

[3]Plaintiff captioned his second amended complaint (Doc. #17) as an amended complaint. However, he filed a complaint and an amended complaint while this litigation was pending in the Court of Common Pleas. Therefore, the Court will refer to the amended pleading which the Plaintiff filed in this Court (Doc. #17) as his second amended complaint.

[4]In ¶ 10 of his second amended complaint (Doc. #17), Plaintiff generally alleges that the incidents which underlay this litigation occurred between August, 1992, and December, 1993. However, the specific incidents of which he complains are all alleged to have occurred in August, 1992.

1992. Plaintiff alleges that, during the period from August 17, 1992, through August 31, 1992, Hatmaker and Wallet subjected him to sexual harassment. In particular, the second amended complaint alleges that Hatmaker exposed his penis and testicles to Plaintiff, threatened to force Plaintiff to engage in oral sex and stuck a ruler up Plaintiff's buttocks without his consent. Doc. #17 at ¶¶ 10-11. In addition, Plaintiff alleges that Hatmaker and Wallet used unwelcome language which was sexually suggestive, offensive and vulgar.[5] Id. at ¶ 10.

In his second amended complaint, Plaintiff purports to set forth five claims for relief, to wit: 1) a claim of sexual harassment under Ohio Revised Code Chapter 4112 against Hewitt, Hatmaker and Wallet (first claim for relief); 2) a claim against all Defendants for the intentional infliction of emotional distress (second claim for relief); 3) a claim against all Defendants for the negligent infliction of emotional distress (third claim for relief); 4) a claim against Hewitt for negligent failure to provide a safe work environment (fourth claim for relief); and 5) a claim of sexual harassment under Title VII against all Defendants, which is the only federal law claim alleged (fifth claim for relief).

---

[5]The only substantive allegation against Hill is that he threatened to throw Plaintiff over a ten-foot fence. Doc. #17 at ¶ 13. In addition, Plaintiff alleges that Boyd Underwood (Underwood"), another Hewitt employee, participated in the harassment by regularly removing his (Plaintiff's) time card, thus preventing him from clocking in and out of work in a timely fashion. Id. at ¶ 12.

[6]Also pending is the motion to dismiss of Underwood (Doc. #6). Underwood was named as a Defendant in Plaintiff's amended complaint, a copy of which is attached to notice of removal (Doc. #1). At Plaintiff's request, this Court previously dismissed his claims against Underwood. See Doc. #11. Moreover, Plaintiff did not name Underwood as a Defendant in his second amended complaint (Doc. #17). Since Underwood is no longer a party to this lawsuit, the Court overrules his motion to dismiss (Doc. #6), as moot.

This case is now before the Court on three motions to dismiss, under Rule 12(b)(6), for failure to state a claim upon which relief can be granted, that of Hatmaker (Doc. #4); Wallet (Doc. #7); and Hewitt and Hill (Doc. #18).[6] All three of these motions to dismiss were served before Plaintiff sought leave to file his second amended complaint (Doc. #17).[7] Nevertheless, the Court will treat those motions as if they were directed at the Plaintiff's second amended complaint. See 6 Wright, Miller & Kane, Federal Practice and Procedure, §1476 at p. 558 (1990) (When ruling on a motion to dismiss, a court must consider an amended complaint; however, it is not necessary to require the defendant to file a new motion to dismiss, directed at the amended complaint).

As an initial matter, the Court will briefly set forth the standards which govern all motions to dismiss filed under Rule 12(b)(6). When ruling on such a motion to dismiss, a court must accept, as true, all factual allegations in the plaintiff's complaint and construe those allegations in the manner most favorable to the plaintiff. Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993). See also, Scheuer v. Rhodes, 416 U.S. 232 (1974). Under Rule 12(b)(6), "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 46-47 (1957)

There are two types of sexual harassment, to wit: harassment which creates a hostile or offensive environment and quid pro quo harassment, in which a supervisor demands sexual fa-

---

[7]Plaintiff sought leave to file his second amended complaint on June 28, 1994. See Doc. #16. That pleading was filed on July 5, 1994. See Doc. #17. Hatmaker filed his motion to dismiss on May 4, 1994, and Wallet filed his motion the following day. Although the motion to dismiss of Hewitt and Hill was not filed until July 7, 1994, it was received by the Clerk of Courts on May 23, 1994 and served on May 4, 1994. See Doc. #18. Indeed, Plaintiff filed his memorandum in opposition to that motion on May 26, 1994.

vors as a condition for job benefits. Kauffman v. Allied Signal, Inc., 970 F.2d 178, 182 (6th Cir. 1992); Rabidue v. Osceola Refining Co., 805 F.2d 611, 618 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987). See also Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). Herein, Plaintiff alleges that the Defendants created a hostile environment; he does not contend that he was the victim of quid pro quo harassment. In their motions to dismiss, the Defendants argue that a male, like the Plaintiff, who alleges to have been sexually harassed by other male employees does not state a claim upon which can be granted under Title VII.[8] In other words, the Defendants contend that male against male sexual harassment is not actionable under Title VII. For reasons which follow, the Court agrees with the Defendants.

There is a split among courts as to whether male against male hostile environment, sexual harassment is actionable under Title VII. See Polly v. Houston Lighting & Power Co., 825 F.Supp. 135, 136-37 (S.D.Tex. 1993).[9] However, the most well reasoned and recent decisions have concluded that a male employee does not state a claim for relief under Title VII for hostile environment, sexual harassment, by alleging that he was sexually harassed by another male employee. For instance, Goluszek v. Smith, 697 F. Supp. 1452 (N.D.Ill. 1988), involved a suit by a male employee against his male supervisor, in which the employee alleged that the supervisor had sexually harassed him by creating a hostile environment. Therein, Judge Williams concluded that such a claim was not actionable under Title VII, reasoning:

---

[8]This argument is most fully developed in the motion to dismiss of Hewitt and Hill (Doc. #8). For instance, Wallet merely incorporates that argument by reference into his motion to dismiss.

[9]In Polly, the court noted the split of authority; however, the Polly court deemed it unnecessary to decide whether a claim by a male that he was sexually harassed by a male coworker was actionable under Title VII. 825 F.Supp. at 137.

Simply stated, the defendant's conduct was not the type of conduct Congress intended to sanction when it enacted Title VII. The goal of Title VII is equal employment opportunity. Connecticut v. Teal, 457 U.S. 440, 448 (1982). That goal is accomplished in part by imposing an affirmative duty on employers to maintain a working environment free of discriminatory intimidation. See E.E.O.C. Dec. No. 74-05, 6 Fair Empl. Prac. Cas. (BNA) 834 (1973). The discri mination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group. Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 Harv. L. Rev. 1449, 1451-52 (1984). Title VII does not make all forms of harassment actionable, nor does it even make all forms of verbal harassment with sexual overtones actionable. The "sexual harassment" that is actionable under Title VII "is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person." Id. at 1451. Actionable sexual-harassment fosters a sense of degradation in the victim by attacking their sexuality. Id. at 1455. In effect, the offender is saying by words or actions that the victim is inferior because of the victim's sex. Cf. Scott v. Sears, Roebuck & Co., 798 F.2d 210, 213 (7th Cir. 1986) ("Such severe harassment becomes discriminatory because it deprives the victim (usually female) of the right to participate in the work place on equal footing with others similarly situated").

During the times relevant to his claim, Goluszek was a male in a male-dominated environment. In fact, with the exception of the reference to a female em-

> ployee in the letter, each and every one of the figures in this story was a male. The argument that Goluszek worked in an environment that treated males as inferior consequently is not supported by the record. In fact, Goluszek may have been harassed "because" he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace. Compare Rabidue, 805 F.2d 611, 623 (Keith, J., dissenting) ('The overall circumstances of plaintiff's workplace evince an anti- female environment"). A wooden application of the verbal formulations created by the courts would salvage Goluszek's sexual-harassment claim. The court, however, chooses instead to adopt a reading of Title VII consistent with the underlying concerns of Congress and grants [the defendant] summary judgment on that claim.

Id. at 1456. This Court finds Judge Williams' reasoning to be persuasive. In addition, the two most recently decided cases, which address the issue and are reported, have reached the conclusion that a male employee does not have a viable claim for sexual harassment, under Title VII, against male co-worker or supervisor, based upon the allegation that the co-worker or supervisor created a hostile work environment. Garcia v. FLF Atochem North America, 28 F.3d 446, 451-52 (5th Cir. 1994); Vandevater v. Wabash National Corp., 1994 U.S. Dist. Lexis 16454 (N.D.Ind. 1994). In contrast to these cases, only one court has expressly held that a male supervisor sexually harasses a fellow, male employee and, thus violates Title VII, by creating a hostile work environment.[10] Showalter v. Allison Reed Group

---

[10] In Joyner v. AAA Cooper Transportation, 597 F.Supp. 537 M.D.Ala. 1983), affirmed without opinion, 749 F.2d 732 llth Cir. 1984), the court concluded that a male employee was the victim of quid pro quo sexual harassment, when his male supervisor conditioned his future employment upon sexual favors. In addition, § 6l4.2(b)(3) of the EEOC Compliance Manual provides that an employee can be the victim of sexual harassment , regardless

Inc., 767 F.Supp. 1205D.R.I. 1991), affirmed on other grounds, 984 F.2d 4 (lst Cir. 1993). Showalter is not as persuasive as the other reported cases, however, because that court reached its conclusion without analysis (i.e., that court merely stated the defendants could be so liable under Title VII) and because the Showalter court also concluded that the defendants were guilty of quid pro quo sexual harassment.

Herein, the Plaintiff alleges that he was the victim of sexual harassment, because his fellow male employees created a hostile work environment. As Judge Williams noted in Goluszek, the gist of such a claim sexual harassment is that the victim was treated as an inferior because of his or her gender and that the harassment created an anti-male (when the victim is a male) or an anti-female (when the victim is a female) work environment. 697 F.Supp. at 1456. In other words, a male victim of hostile environment, sexual harassment must allege that he was harassed because he was a male. When both the harasser and the victim are male, the harasser must have treated the victim in an inferior manner because of the victim's gender and, as a result, created an anti-male work environment. In his second amended complaint (Doc. #17), the Plaintiff does not allege that his workplace was other than male dominated. Indeed, with one exception, those mentioned in that pleading are male.[11] Moreover,

---

of the sex of the harasser. However, in the manual, the EEOC illustrates male against male sexual harassment by citing an example of quid pro quo harassment. Once again, Plaintiff does not contend that he was the victim of quid pro quo sexual harassment (This Court expresses no opinion on the question of whether a male has an actionable claim against a male co-worker for quid pro quo sexual harassment). Moreover, the EEOC's guidelines are "intraagency suggested interpretive regulations which are not binding on courts." Rabidue, 805 F.2d at 619 n. 4. Therefore, even if this Court interpreted the EEOC's Compliance Manual as stating that male against male hostile environment, sexual harassment violates Title VII, it would not be bound to follow those guidelines.

[11]The one exception is Ms. Jackie Garland, Hewitt's personnel manager. Plaintiff alleges that he filed a complaint of sexual harassment with Garland. Doc. #17 at ¶ 15.

Plaintiff does not allege that the harassment to which he was subjected created an anti-male work environment. In addition, Plaintiff does not allege that he was harassed because he was a male or set forth factual allegations which would support such a contention; rather, he merely alleges that he "believes" he was harassed because he is a male. Therefore, as did Judge Williams in Goluszek, this Court concludes that a claim of male against male hostile environment, sexual harassment is not actionable under Title VII, in the absence of an allegation that an anti-male environment was created thereby. Accordingly, the Court sustains the Defendants' motions to dismiss (Docs. ##4, 7 and 18), to the extent that, with those motions, the Defendants seek dismissal of Plaintiff's claim under Title Vil.[12]

Having concluded that Plaintiffs claim under Title VII, the sole claim upon which this Court's subject matter jurisdiction was founded, must be dismissed, the Court must decide whether it should exercise supplemental jurisdiction over plaintiff's four state law claims and, thus, rule on the motions to dismiss as they relate to those claims or whether, in the alternative, it should remand those claims to state court. The predecessor to supplemental jurisdiction, pendent jurisdiction, had its genesis in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). In Gibbs, the Supreme Court concluded that, when the state and federal claims arise from the same nucleus of operative facts, the district court could exercise pendent jurisdiction over state law claims. Id. at 725. However, the Gibbs Court cautioned:

> That power [the power to exercise pendent jurisdiction] need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of

---

[12]Because the Court has concluded that Plaintiff does not have an actionable claim under Title VII, it is not necessary to address Hatmaker's argument that Title VII does not apply to him, as an individual.

> judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them .... Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.

Id. at 726 (citation and footnotes omitted). In Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988), the Supreme Court explained the doctrine of pendent jurisdiction:

> Under Gibbs, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction. ... As articulated by Gibbs, the doctrine of pendent jurisdiction thus is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values.

* * *

> Gibbs establishes that the pendent jurisdiction doctrine is designed to enable courts to handle cases involving state-law claims in the way that will best accommodate the values of economy, convenience, fairness, and comity, and Gibbs further establishes that the Judicial Branch is to shape and apply the doctrine in that light.

Id. at 350-51 (citations and footnote omitted).

When Congress enacted supplemental jurisdiction, it codified and expanded the doctrine of pendent jurisdiction. Executive Software v. U.S. District Court, 24 F.3d 1545 (9th Cir. 1994). For instance, § 1367(c) provides that a district court may decline to exercise supplemental jurisdiction over a state law claim when the federal claim has been dismissed or when the state law claim raises novel questions of state law. Herein, this Court has dismissed the Plaintiff's only federal law claim. Moreover, Plaintiffs state law claims raise at least one novel issue of state law, to wit: does a male employee have a claim under Chapter 4112 for sexual harassment arising out of allegations that male co-workers created a hostile work environment. Accordingly, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims.

Having decided not to exercise supplemental jurisdiction over the Plaintiff's state law claims, the Court must decide whether to dismiss or to remand those claims. In Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1987), the Supreme Court held that, after dismissing the federal claim, a district court could decline to exercise pendent jurisdiction and remand a case to state court (as opposed to dismissing the lawsuit). The Cohill Court cautioned that a district court should dismiss rather than remand a case, when the plaintiff was engaging in forum shopping. Id. at 357. Herein, there is no hint of forum shopping, since not only did the Plaintiff file this lawsuit in state court and

the Defendants remove it here, but also the Plaintiff's federal law claim has been dismissed upon the motion of the Defendants and not at the Plaintiff's request. Therefore, this Court will remand rather than dismiss the Plaintiff's state law claims.

Based upon the foregoing, the Court sustains the Defendants' motions to dismiss (Doc. ##4, 7 and 18), to the extent that with those motions the Defendants seek dismissal of Plaintiff's claim under Title VII. In addition, the Court has declined to exercise supplemental jurisdiction over the Plaintiff's state law claims and orders those claims to be remanded to state court. Therefore, the Court has not ruled on the motions to dismiss, as those motions relate to the Plaintiff's state law claims. The Court hereby directs that judgment be entered in the following manner, to wit: 1) on Plaintiff's claim under Title VII, in favor of Defendants and against plaintiff, dismissing that claim with prejudice; and 2) on Plaintiff's state law claims, that these claims be remanded to state court.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

ROGER D. FLEENOR 1280 Melrose Avenue Kettering, Ohio 45409	:	CIVIL ACTION NO.: C-3-94-182 JUDGE WALTER RICE

Plaintiff,

-VS-

THE HEWITT SOAP COMPANY, INC. 333 Linden Avenue Dayton, Ohio 45403	:	AMENDED COMPLAINT AND JURY DEMAND

BILL HATMAKER, individually,
and as Agent for,
The Hewitt Soap Company, Inc.
333 Linden Avenue
Dayton, Ohio 45403

KEN WALLET, individually,
and as Agent for,
The Hewitt Soap Company, Inc.
333 Linden Avenue
Dayton, Ohio 45403

AND

RON HILL
as Agent for,
The Hewitt Soap Company, Inc.
333 Linden Avenue
Dayton, Ohio 45403

Defendants.

Now comes the Plaintiff, Roger D. Fleenor, by and through counsel and for his Complaint against the above-named Defendants avers and states as follows:

PARTIES

1. Plaintiff, Roger D. Fleenor, is a white male citizen of the United States and **resident of the State of Ohio, County of Montgomery, City of Kettering, and an employee** of Defendant, The Hewitt Soap Company, Inc. ("Corporation")

2. Defendant Corporation is organized under the laws of the State of Ohio and at all times pertinent hereto was conducting business at 333 Linden Avenue, City of Dayton, Ohio.

3. Defendant, Bill Hatmaker ("Hatmaker") **is** a caucasian male resident of the State of Ohio, County of Miami, and at all times pertinent hereto was employed by the Corporation as a pipefitter.

4. Defendant, Ken Wallet ("Wallett") is a caucasian male resident of the State of Ohio, County of Montgomery, and at all times pertinent hereto was employed by Defendant Corporation as the maintenance supervisor.

5. Defendant, Ron Hill ("Hill") is a caucasian male resident of the State of Ohio, County of Montgomery, and at all times pertinent hereto, was employed by Defendant Corporation.

FACTUAL BACKGROUND

6. Plaintiff commenced his employment with the Corporation in April 1988 as a cleanup operator and was being trained as a bleacher operator when the initial harassment began.

7. During the course of Plaintiff's employment with the Corporation, he has worked under the direct supervision of Defendant Hill, Dave Setzler and Bill Bryant.

8. At all times relevant to this Complaint, Defendant, Hatmaker also worked under the direct supervision of Defendant, Wallet.

9. During the period from August 17, 1992 through August 31, 1992, Plaintiff, while undergoing training as a bleacher operator, was subjected to and the victim of repeated and unwelcomed sexual advances and harassment by Defendants, Hatmaker and Wallet.

10. During the period from August 1992 through December 1993, Plaintiff was subjected to an intimidating, hostile, and offensive work environment created by the actions of Defendants, Hatmaker, Wallet, Hill and Boyd Underwood, an employee of Defendant Corporation, including but not limited to, the exposure by Hatmaker during August of 1992 of his penis and testicles to Plaintiff while at work and the use by Hatmaker and Wallet of unwelcomed sexually suggestive offensive and vulgar language in an attempt to threaten and intimidate Plaintiff.

11. Defendant Hatmaker further participated in the harassment and intimidation of Plaintiff by threatening to force Plaintiff to engage in oral sex with Defendant and by sticking a ruler up Plaintiff's buttocks without Plaintiff's consent and against Plaintiff's will.

12. Boyd Underwood participated in the harassment and intimidation of Plaintiff by regularly removing Plaintiff's time card from its proper place thereby agitating Plaintiff and preventing him from clocking in and out of work in a timely manner.

13. Defendant Hill participated in the harassment and intimidation of Plaintiff by threatening to throw Plaintiff over a ten foot fence during the course of Defendant's employment with the Corporation and while acting within the scope of his em-

ployment.

14. At all times pertinent hereto, Defendants, Hatmaker, Wallet, Hill and Boyd Underwood were acting within the scope and/or during the course of their employment with the Defendant Corporation.

15. In August 1992, Plaintiff filed a Complaint with Ms. Jackie Garland, the Personnel Manager of Defendant Corporation's Personnel Department, regarding the sexual harassment and intimidation initiated by Hatmaker and Wallet.

16. Plaintiff is informed and believes that, as a consequence of Plaintiff's filing an internal complaint with Defendant Corporation's Personnel Department, Plaintiff's current supervisor, Bill Bryant, retaliated by unfairly increasing Plaintiff's work responsibilities in an effort to continue the harassment of Plaintiff.

17. As a direct and proximate result of the unwelcomed and continuous campaign of sexual harassment and intimidation, Plaintiff suffered psychologically and as a result sought the care of a psychologist for treatment.

18. As a further result of the unwelcomed sexual harassment and intimidation Plaintiff suffers from and was diagnosed with Post-Traumatic Stress Disorder.

19. As a result of the actions of the Defendants, Hatmaker, Wallet, Hill and Boyd Underwood, Plaintiff suffered pain, mental anguish, and emotional distress and has been unjustly and discriminatorily deprived of equal employment opportunities with the Corporation.

20. As a further result of the Defendants' actions, Plaintiff has been, is being, and will be deprived of income in the form of wages, promotion opportunities, and job assignments due to

Plaintiff as an employee of the Corporation, but denied to him because of the harassment in an amount to be proved at trial.

FIRST CLAIM FOR RELIEF
SEXUAL HARASSMENT

21. Plaintiff restates the allegations contained in Paragraphs One (1) through twenty (20) above as if fully restated herein. At all times herein mentioned, Defendant Corporation had in effect a sexual harassment policy which prohibited sexual harassment and expressly excluded such behavior as verbal harassment or abuse, subtle pressure for sexual activities, demanding sexual favors, patting or pinching, off-color jokes, or using degrading terms to fellow employees. While in the scope of their employment, Defendants, Hatmaker and Wallet, sexually harassed Plaintiff in violation of the Defendant Corporation's policy and in violation of the Ohio Revised Code Chapter 4112.

22. The aforementioned harassment consisted of drawing derogatory pictures and diagrams of Plaintiff, tampering with Plaintiff's belongings including placing a dead bird in Plaintiff's mop bucket, sticking a ruler up Plaintiff's buttocks, making repeated sexual insults and slurs concerning Plaintiff and Plaintiff's former girlfriend in Plaintiff's presence; and unwelcomed, uninvited sexual advances by Defendants, Hatmaker and Wallet toward Plaintiff which created an offensive hostile working environment for Plaintiff.

23. As a direct and proximate result of the unwelcomed sexual harassment Plaintiff has suffered extreme psychological and emotional distress and damages in an amount to be determined at trial, but being in excess of Twenty Five Thousand Dollars ($25,000.00).

SECOND CLAIM FOR RELIEF INTENTIONAL
INFLICTION OF EMOTIONAL DISTRESS

24. Plaintiff reasserts and realleges all of the allegations con-

tained in Paragraphs One (1) through Twenty Three (23) as if restated fully herein.

25. The foregoing conduct of Defendants, Hatmaker, Wallet, Hill and Boyd Underwood was intended to cause Plaintiff, Roger Fleenor, serious emotional distress.

26. Defendant, Hatmaker, willfully, wantonly, and maliciously sexually harassed Plaintiff by offensively touching Plaintiff on the buttocks, exposing himself to Plaintiff and making derogatory sexual comments about Plaintiff and Plaintiff's girlfriend in Plaintiff's presence.

27. On or about September 10, 1992, Defendant Hatmaker received a written reprimand from the Defendant Corporation as a result of the intimidation and Harassment of Plaintiff (See the Sept. 10, 1992 statement attached hereto as Exhibit A and made apart hereof).

28. Defendant Hatmaker indicated in the written reprimand that his actions against Plaintiff were done with the intent to intimidate and harass Plaintiff.

29. Defendant, Wallet, willfully, wantonly, and maliciously sexually harassed Plaintiff by making derogatory sexual comments about Plaintiff and Plaintiff's girlfriend.

30. The intended actions of Defendants, Hatmaker and Wallet, were extreme and outrageous and beyond the bounds of decency.

31. As a result of the conduct of Defendant's, Plaintiff, Roger Fleenor, suffered mental anguish and severe emotional distress so serious in nature that no reasonable person could be expected to endure it.

32. As a direct and proximate result of the intentional infliction of emotional distress, Plaintiff has been damaged in an amount to be determined at trial, but being in excess of Twenty Five Thousand Dollars ($25,000.00).

THIRD CLAIM. FOR RELIEF
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

33. Plaintiff restates the allegations contained in Paragraphs One (1) through Thirty Two (32) as if restated fully herein.

34. The aforesaid actions of the Defendants were negligent and proximately resulted in severe emotional distress to Plaintiff. Such injury to Plaintiff was or should have been reasonably foreseeable to Defendants.

35. As a direct and proximate cause of Defendant's actions, Plaintiff has been damaged in an amount to be determined at trial, but being in excess of Twenty Five Thousand Dollars ($25,000.00).

FOURTH CLAIM FOR RELIEF NEGLIGENT FAILURE TO PROVIDE A SAFE WORK ENVIRONMENT

36. Plaintiff reasserts and realleges all of the allegations contained in Paragraphs One (1) through Thirty Five (35) as if restated fully herein.

37. Defendant Corporation as the employer of Plaintiff, owed a duty to Plaintiff to provide workplace which would not subject Plaintiff to sexual harassment and intimidation.

38. Defendant Corporation as the employer of Plaintiff, owed a duty to Plaintiff to provide training and other instruction to its employees in an effort to prevent the sexual harassment and intimidation which Plaintiff experienced from occurring.

39. Defendant Corporation knew or should have known about the past sexual harassment activity by Defendants' Hatmaker and Wallet.

40. Defendant Hatmaker had a history of harassing males like Plaintiff and was well known in his department as a harasser.

41. By hiring, retaining and entrusting to Defendant Wallet the authority to supervise employees and by retaining Defendant Hatmaker in his position despite both actual and/or constructive knowledge of Defendant Wallet and Hatmaker's propensity to engage in sexual harassment activity, Defendant Corporation acted negligently towards Plaintiff, breaching its duty to hire, retain, and entrust authority in a reasonably responsible manner and causing Plaintiff emotional distress, mental anguish, frustration, and humiliation.

42. Defendant Corporation knew or should have known of the foreseeable consequences of the above-described actions of Defendants, Hatmaker, Wallet, Underwood and Hill.

43. Defendant Corporation was negligent in the retention of Defendant Wallet as a supervisor, and Defendant Hatmaker since it knew or should have known of past sexual harassment claims against Defendants Wallet and Hatmaker.

44. Defendant Corporation was further negligent in its failure to provide proper training and instruction to all its employees, including the Defendants, in the importance of preventing sexual harassment activity from occurring in the work place and in properly instructing the employees on the seriousness of the act and the punishment which would result therefrom.

45. The insufficient action of Defendant Corporation as stated herein constituted a breach of duty owed to Plaintiff, Roger Fleenor to provide a safe work environment.

46. As a direct and proximate result of Defendant Corporation's breach of duty, Paintiff has experienced severe mental and psychological problems and has been damaged in an amount to be determined at trial, but being in excess of Twenty Five Thousand Dollars ($25,000.00).

FIFTH CLAIM FOR RELIEF
VIOLATION OF TITLE VII

47. Plaintiff restates the allegations contained in Paragraphs one through fourty-six (46) as restated fully herein.

48. On or about September 21, 1992, Plaintiff timely filed a charge affidavit simultaneously with the Equal Employment Opportunity Commission (EEOC) and the Ohio Civil Rights Commission (OCRC), a true and accurate copy of which is attached hereto as Exhibit B and made apart hereof.

49. Plaintiff alleges, and the Charge Affidavit specifically provides, among other things, that Plaintiff believes that he was harassed by the Defendants because of his sex.

50. On or about September 30, 1993, a right-to-sue letter was issued by the EEOC, a true and accurate copy of which is attached hereto as Exhibit C and made apart hereof.

51. By sexually harassing Plaintiff, both Defendant Employer and Defendant Supervisors Hill and Wallet, and Defendant Hatmaker, who were acting within the scope of their employment, violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq, as amended by the Civil Rights Act of 1991, 42 U.S.C. §1981A, with malice or reckless indifference to Plaintiff's rights.

52. As a result of Defendants' unlawful actions against the Plaintiff in violation of Title VII of the Civil Rights Act, Plaintiff

has suffered severe emotional distress and has otherwise been discriminated against in violation of Title VII.

WHEREFORE, based on the foregoing, Plaintiff prays for judgment against Defendants and each of the jointly and severally as follows:

A. On the First Claim For Relief, Plaintiff prays for this Court to:

1. Enter a judgment against Defendant Corporation that the practices complained of herein are unlawful and violative of the Ohio Revised Code, Chapter 4112:

2. Permanently enjoin Defendant Corporation, its agents, successors, officers, employees, attorneys, and those acting in concert with it or them from engaging in each of the unlawful practices, policies, customs, and usages set forth herein, and from continuing any and all practices shown to be in violation of application law; and

3. Award Compensatory damages in an amount as yet undetermined but being in excess of Twenty Five Thousand Dollars ($25,000.00);

B. On the Second Claim For Relief, Compensatory damages in an amount as yet undetermined but being in excess of Twenty Five Thousand Dollars ($25,000.00);

C. On the Third Claim For Relief, Compensatory damages in an amount as yet undetermined but being in excess of Twenty Five Thousand Dollars ($25,000.00);

D. On the Fourth Claim For Relief, Compensatory damages in an amount as yet undetermined but being in excess of Twenty Five Thousand Dollars ($25,000.00);

E. On the Fifth Claim For Relief, Compensatory damages in an amount as yet undetermined but being in excess of Seventy Five Thousand Dollars ($75,000.00);

F. Award him punitive damages of $150,000.00 under Title VII and additional amounts as justified by the evidence under his supplemental claims;

G. With regard to all claims set forth herein, judgement for all reasonable attorney fees, court costs, and interest (pre-judgment and post-judgment) therein at the equal rate through the date of full payment; and

H. Grant such other and further relief as may be just and proper.

Respectfully Submitted,

Kelvin L. Boddie, #0029696
120 West Second Street
Suite 636 Hulman Building
Dayton, Ohio 45402
(513) 225-5883
Counsel For Plaintiff

Respectfully Submitted,

JURY DEMAND

Plaintiff demands a trial by jury on all issues triable of right by a jury.

Kelvin L. Boddie

BILL HATMAKER'S WORK RECORD
EXHIBIT A

DATE	SUBJECT WORK EXPERIENCE RECORD
6-21-83	VERBAL WARNING Bill was given a verbal warning on 6-21-83 for being out of his work area and as a result over ran the Coconut Oil Tr. #255 in cold soap making on 6-17-82. (Signatures) Rick Wyatt Bill Hatmaker
12-5-85	WRITTEN WARNING While unloading tallow from rail car, Bill over filled storage truck and ran 5,000 LBS. of tallow on the ground. Written warning in presence of Martha Pratt and D. Setzler. (Signatures) Lou O. 12-5-85
9-10-92	VERBAL WARNING On Aug. 24, 1992 your manager, Ken Wallet observed you engaging in horseplay and making an obscene gesture towards another Hewitt employee. Also on this date you engaged in a further intimidating manner by touching the Buttocks of this same employee with your tape measure. By your own admission both of these incidents were meant to intimidate this employee. This type of behavior is both against Federal Law and company policy. You are here by warned that your behavior on the above date is unacceptable and will not be tolerated. If you continue to engage in harassment and/or the violation of any company work rule, you will be subjected to further Disciplinary Action, up to

and including termination.
This is to certify that the above statement was read to Bill Hatmaker on 9-10-92 in the presence of Ron Zornes (Union Representative).RZ

(Signatures)
Ken Wallet
Dan Bonzell

EXHIBIT B

_____ and EEOC

NAME (Indicate Mr. Ms., Mrs)	HOME TELEPHONE (Include Area Code)
Mr. Roger D. Fleenor	(513) 299-8602
STREET ADDRESS CITY, STATE AND ZIP CODE	DATE OF BIRTH
1054 WILES DR. KETTERING, OH 45419	02/02/64

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME

NAME	NUMBER OF EMPLOYEES, MEMBERS	TELEPHONE
HEWITT SOAP CO	Cat C (201-500)	(513) 253-1151
STREET ADDRESS		COUNTY
333 LINDEN AVE. DAYTON, OH 45403		113
NAME		
STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN

☐ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST / / LATEST 08/31/92
☒ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s):*

I. I am a male. I started with the company in 1988. I was being trained for a new job when I was sexually harassed by other employees. I was disqualified from the job beause I felt so nervous and stressed.

II. Jackie Garland the Personnel Manager said she has talked to the employees to advise them that the harassment was to stop. She said that is all she can do.

III. I beleive I have been discriminated against because of my sex.

RECEIVED - O.C.R.C. - NSW
SEP 29 1992

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

NOTARY - (When necessary for State and Local Requirement(s)
I swear or affirm that I have the above charge and that it is true to the best of my knowledge, information and belief.
SIGNATURE OF COMPLAINANT
s/s Roger D. Fleenor
SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
17th of September 1992

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Cleveland District Office

Tower City - Skylight Office Tower
1660 West Second Street - Suite 850
Cleveland, OH 44113-1454
PH: (216) 522-2001
TDD: (216) 522-8441
FAX: (216) 522-7395
Charge No. 221920901

Roger D. Fleenor
1054 Wiles Drive
Kettering, OH 45419 Charging Party

The Hewitt Soap Company, Inc.
333 Linden Avenue
Dayton, OH 45403

Respondent

DETERMINATION

Under the authority vested in me by EEOC regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended.

Respondent is an employer within the meaning of Title VII, and the timeliness, deferral, and all other jurisdictional requirements have been met.

In view of the fact that the parties have not requested a substantial weight review of OCRC's findings, the Equal Employment Opportunity Commission adopts the OCRC's finding that the evidence obtained during the investigation does not establish a violation of the statute.

This determination concludes the Commission's processing of the subject charge. As the charge alleged a Title VII violation, this is notice that if the Charging party wishes to pursue this matter further the party may do so by filing a private action in U.S. District Court against the Respondent named above within 90 **days of receipt of this Determination.** Once this 90-day period is over., the right to sue will be lost. Filing this notice is not sufficient. A court complaint must contain a short statement of the facts of this case which shows that the aggrieved party is entitled to relief.

The lawsuit must be filed in U.S. District Court. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are)kept, where the employment would have been, or where the Respondent has its main office.

If the party cannot afford or is unable to obtain a lawyer to represent him/her, the U.S. District Court having jurisdiction in the case may, at its discretion, assist the party in obtaining a lawyer. If the party plans to ask the U.S. District Court to help find a lawyer, this request must be made of the court in the form and manner it requires. The request to the U.S. District Court should be made well before the end of the time period mentioned above. A request for representation does not relieve the party of the obligation to file a lawsuit within this 90-day period.

Contact the EEOC if there are any questions about legal rights,

includinq advice on which U.S. District Court can hear the case, or if it is necessary to inspect and copy information contained in the case file.

If suit is filed, send a copy of the court complaint to the office where the charge was filed within 10 days after filing. The file will then be preserved. Generally EEOC's rules call for this charge file to be destroyed two years from now unless EEOC is notified that suit has been filed in U.S. District Court.

On Behalf of the Commission:

SEP30 1993.
Date

Susan L. McDuffie
District Director

Supreme Court, U.S.
FILED
AUG 8 1996
CLERK

(2)

No. 96-47

In The

Supreme Court of the United States

October Term, 1995

ROGER D. FLEENOR,

Petitioner,

v.

HEWITT SOAP COMPANY; BILL HATMAKER; KEN WALLET; RON HILL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

HAROLD S. FREEMAN
(Counsel of Record)
JOHN M. KUNST, JR.
DINSMORE & SHOHL, P.L.L.
1900 Chemed Center
255 E. Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Attorneys for Respondents Hewitt Soap Company and Ron Hill

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 pp

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit properly affirm the district court's dismissal of Petitioner's Title VII sexual harassment claim on the ground that Petitioner failed to allege facts sufficient to show the existence of respondeat superior liability?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Sixth Circuit were as follows:

1. Roger D. Fleenor – Plaintiff/Appellant.
2. Hewitt Soap Company – Defendant/Appellee. Pursuant to Supreme Court Rule 29.6, the parent company of Hewitt Soap Company is American Safety Razor Company, One Razor Blade Lane, P.O. Box 500, Staunton, Virginia 24401.
3. Bill Hatmaker – Defendant/Appellee.
4. Ken Wallet – Defendant/Appellee.
5. Ron Hill – Defendant/Appellee.

TABLE OF CONTENTS

	Page
Counterstatement Of The Question Presented	i
List Of Parties And Rule 29.6 Statement	ii
Table Of Contents	iii
Table Of Authorities	iv
Brief In Opposition	1
Statement Of The Case	1
Reasons Why The Petition Should Be Denied	4
Conclusion	6

TABLE OF AUTHORITIES

Page

STATUTES

Title VII of the Civil Rights Act of 1964 .....1, 2, 3, 4

Ohio Revised Code Chapter 4112 1

BRIEF IN OPPOSITION

Respondents Hewitt Soap Company and Ron Hill submit this Brief in Opposition to Roger Fleenor's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner Roger D. Fleenor sued Respondents Hewitt Soap Company and Bill Hatmaker, Ken Wallet, Ron Hill and Boyd Underwood,[1] who are employees of Hewitt Soap Company. Petitioner alleged in his Second Amended Complaint that Respondents perpetrated a variety of torts against him, as well as violations of Ohio Revised Code Chapter 4112 and Title VII of the Civil Rights Act of 1964.

Petitioner filed a charge of discrimination with the Ohio Civil Rights Commission ("OCRC") and Equal Employment Opportunity Commission ("EEOC") on September 17, 1992. On April 1, 1993, the OCRC reached a determination of No Probable Cause of Discrimination. The OCRC denied Petitioner's Request for Reconsideration on August 10, 1993. The EEOC issued a "Right to Sue" letter on September 30, 1993.

---

[1] Petitioner voluntarily dismissed his claims against Underwood while the case was still pending in the district court. Petitioner did not name Underwood as a Defendant in his Second Amended Complaint and, for these reasons, the district court ruled that Underwood was no longer a party to this lawsuit. (Pet. App. at B-3 n.6).

Petitioner then filed a Complaint in the Court of Common Pleas, Montgomery County, Ohio on December 28, 1993. On April 7, 1994, Petitioner amended his Complaint to add a claim of hostile environment sexual harassment under Title VII. On April 29, 1994, Respondent Hewitt Soap Company removed the matter to the United States District Court, Southern District of Ohio, Western Division. Respondents then filed Motions to Dismiss all of Petitioner's claims pursuant to Federal Civil Rule 12(b)(6).

On June 28, 1994, after being served with and filing a response to Respondents' Motions to Dismiss, Petitioner sought leave to file a Second Amended Complaint. On December 21, 1994, the district court filed its Order granting Respondents' Motions to Dismiss Petitioner's federal claim of hostile environment sexual harassment under Title VII, concluding that Petitioner's same-sex sexual harassment claim, as pled, was not actionable under Title VII.[2]

On January 12, 1995, Petitioner filed a Notice of Appeal in the United States Court of Appeals for the Sixth Circuit, challenging dismissal of the Title VII claim. On April 9, 1996, the Sixth Circuit filed its Decision and Order affirming the dismissal of Petitioner's Title VII claim. The Sixth Circuit did not address the issue of whether a claim of same-sex hostile environment sexual

---

[2] The district court treated Respondents' Motions to Dismiss as if they were directed at Petitioner's Second Amended Complaint. The district court remanded Petitioner's remaining state law claims to the Montgomery County Court of Common Pleas.

harassment is actionable under Title VII. Instead, the Sixth Circuit addressed *only* the issue of respondeat superior liability as a required element of Petitioner's Title VII claim. The Sixth Circuit held that, even accepting the factual allegations in the Petitioner's Second Amended Complaint as true, he failed to establish respondeat superior liability. (Pet. App. at A-5).[3]

In reviewing the allegations in Petitioner's Second Amended Complaint, the Sixth Circuit noted that the harassment was alleged to have occurred over a two-week period in August of 1992. (Pet. App. at A-2). When the Petitioner complained to the Respondent Company about the alleged harassment, the Company promptly investigated the matter and disciplined Respondent Hatmaker with a written reprimand. (Pet. App. at A-5, C-12, 13). The Sixth Circuit further noted that, by the Petitioner's own admission, the harassment ended. (Pet. App. at A-5). The Sixth Circuit concluded that since the Respondent Company took prompt and effective corrective action to end the alleged harassment, Petitioner failed to state a claim under Title VII. (Pet. App. at A-5).

---

[3] Petitioner disingenuously attempts to "expand" upon the factual allegations pled in his Second Amended Complaint in his Petition. In particular, the statements attributed to both Hatmaker and Wallet alleged in the Petition (Pet. at 3-4) were not pled by Petitioner in his Second Amended Complaint. Given that this case was dismissed by the district court and affirmed by the Sixth Circuit on the basis of a Rule 12(b)(6) motion to dismiss, Petitioner's "new" allegations are inappropriate and should be ignored.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has presented a Petition for Certiorari that is based upon the merits of an issue not even addressed by the Sixth Circuit. Petitioner spends a large portion of his Petition addressing the issue of same-sex sexual harassment in an attempt to give the impression that the Petition somehow involves an important question of federal law. Petitioner's discussion of the same-sex sexual harassment issue is irrelevant, however, because the Sixth Circuit did not reach this issue. Instead, the Sixth Circuit disposed of the case on a totally different basis. Petitioner concedes as much when he states that the Sixth Circuit "refused to address the question of whether Title VII prohibits same-sex sexual harassment." (Pet. at 5). In sum, the Petition misses the point because it seeks review of a decision by the Sixth Circuit on an issue that was not even decided by that court.

Moreover, the issue that was decided by the Sixth Circuit does not merit this Court's review. The Sixth Circuit determined that the factual allegations contained in the Petitioner's Second Amended Complaint (the *third* Complaint filed by Petitioner) failed to establish the element of respondeat superior liability and therefore failed to state a claim for sexual harassment under Title VII. The Sixth Circuit's narrow holding does not raise an important question of federal law. Nor does it address a novel or controversial issue that warrants this Court's attention. Inasmuch as Petitioner agrees with the legal standard applied by the Sixth Circuit (Pet. at 15), he is merely seeking to have this Court review the Sixth Circuit's evaluation of the pled facts on the issue of respondeat

superior liability. This is not an area that warrants this Court's review.

The Sixth Circuit correctly applied established precedent in determining that the Petitioner's Second Amended Complaint failed to establish respondeat superior liability. The Sixth Circuit's decision turns on its own facts, as pled by the Petitioner, and will not have a substantial impact on other cases or litigants. Petitioner's spurious attempt to seek certiorari on an issue (*i.e.*, same-sex sexual harassment) not even addressed by the decision below should not be countenanced by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HAROLD S. FREEMAN
JOHN M. KUNST, JR.
DINSMORE & SHOHL, P.L.L.
1900 Chemed Center
255 E. Fifth Street
Cincinnati, OH 45202
(513) 977-8200

Attorneys for Respondents
Hewitt Soap Company and Ron Hill

We join in this Brief on behalf of Respondent Bill Hatmaker.

JOSÉ M. LOPEZ
WEISBROD & LOPEZ CO., L.P.A.
9 West Water Street
Troy, OH 45373

Attorney for Respondent
Bill Hatmaker

We join in this Brief on behalf of Respondent Ken Wallet.

RICHARD L. CARR, JR.
DUNLEVEY, MAHAN & FURRY
One Citizens Federal Centre,
Suite 1000
110 N. Main Street
Dayton, Ohio 45402

Attorney for Ken Wallet

August 6, 1996

Supreme Court, U.S.
FILED
SEP 25 1996
CLERK

(3)

NO. 96-47

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

ROGER D. FLEENOR,

Petitioner,

v.

HEWITT SOAP COMPANY; BILL HATMAKER; KEN WALLET; RON HILL,

Respondent.

BOYD UNDERWOOD, AGENT FOR THE HEWITT SOAP CO., INC.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF OF PETITIONER

KELVIN L. BODDIE
Counsel of Record
120 West Second Street, Suite 636
Dayton, OH 45402
(937) 461-1399

Counsel for Petitioner

7PP

PARTIES TO THE PROCEEDING

1. Roger D. Fleenor (hereafter referred to as "Fleenor"), Plaintiff in the District Court and Petitioner.

2. Hewitt Soap Company (hereafter referred to as "Hewitt Soap"), Defendant in the District Court and Respondent.

3. Bill Hatmaker (hereafter referred to as "Hatmaker"), Defendant in the District Court and Respondent.

4. Ken Wallet (hereafter referred to as "Wallet"), Defendant in the District Court and Respondent.

5. Ron Hill (hereafter referred to as "Hill"), Defendant in the District Court and Respondent.

6. Boyd Underwood (hereafter referred to as "Underwood"), Defendant in the District Court and Respondent.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ARGUMENT 1

CONCLUSION 3

TABLE OF AUTHORITIES

Conley v. Gibson, 355 U.S. 41 (1957) 2

EEOC v Hacienda Hotel,
881, F.2d 1504 (9th Cir. 1989) *3*

Harris v. Forklift Systems, Inc., 510 U.S. 17,
114 S.Ct. 367, 126 L.Ed.2d 295 (1993) 2

Hirschfeld v. New Mexico Corrections Dept.,
916 F.2d 572 (10th Cir. 1990) 3

Meritor Savings Bank v. Vinson,
477 U.S. 57, 106 S.Ct. 2399,
91 L.Ed.2d 49 (1986) 2

Pullman-Standard v. Swint,
456 U.S. 273, 102 S.Ct. 1781,
72 L.Ed.2d 66 (1982) 2

Quick v. Donaldson Company, Inc.,
90 F.3d 1372 (8th Cir. 1996) 1

Wilson v. Seiter, 111 S.Ct. 2321 (1991) 2

STATUTES:

42 U.S.C. @2000e-2(a) 1

ARGUMENT

THE SIXTH CIRCUIT ERRED IN APPLYING THE MOTION TO DISMISS STANDARD OF REVIEW BY FAILING TO CONSIDER THE FACTS IN PETITIONER'S COMPLAINT IN A LIGHT MOST FAVORABLE TO PETITIONER PRIOR TO AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S SEXUAL HARASSMENT CLAIM.

The Sixth Circuit Court of Appeals in an attempt to avoid the same-sex sexual harassment question failed to apply the correct motion to dismiss standard of review and therefore affirmed the district court's dismissal of Petitioner's 42 U.S.C. @2000e-2(a) ("Title VII") claim. In addition, the Sixth Circuit failed to apply the correct legal standard with respect to respondent superior liability.

It is undisputed that the issue before the Sixth Circuit was same-sex sexual harassment. It is further undisputed that the district court dismissed Petitioner's case because the court determined that a same-sex sexual harassment claim was not cognizable under Title VII. Given the division among the federal courts on the same-sex sexual harassment issue, the Sixth Circuit in an attempt to avoid the issue, determined that Petitioner's Complaint failed to establish respondeat superior liability. See the July 29, 1996 Eighth Circuit decision in *Quick v. Donaldson Company, Inc.*, 90 F.3d 1372 (8th Cir. 1996), wherein the Eighth Circuit held that you could have a same-sex cause of action under Title VII thereby creating a clear split in the Circuits on the issue of same-sex sexual harassment.

When the wrong legal standard has been applied by a lower court this Court usually reverses the decision below.

See *Pullman-Standard v. Swint* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); Wilson v. *Seiter,* 111 S.Ct. 2321(1991), and *Harris.* v. *Forklift Systems Inc.,* 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). In the instant case, the Sixth Circuit not only failed to apply the correct standard of review with respect to the motions to dismiss, but also failed to apply the correct legal standard with respect to respondeat superior liability.

Notwithstanding the Respondent's suggestion that the Sixth Circuit's narrow holding does not raise an important question of federal law, we believe that it most certainly does and the discussion in *Meritor Savings Bank* v. *Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)* regarding agency principles and respondeat superior liability along with the following analysis supports said belief.

First, a finding of respondeat superior liability is critical to the establishment of a sexual harassment claim under Title VII. This element of a Title VII case is no less important than the psychological injury issue addressed in *Harris* by this Court. Each addresses an element of a Title VII claim which is critical to the establishment of the claim.

Second, if the Sixth Circuit had applied the motion to dismiss standard of review established in *Conley v. Gibson, 355* U.S. 41(1957), there would have been at least three ways in which the Sixth Circuit could have found respondeat superior liability based upon Petitioner's Complaint. The Complaint clearly alleges that both Hatmaker and Wallet harassed others in the past and that the Company knew or should have known about the harassment thereby establishing employer liability (Pet. at C-8). Further, since Wallet was Hatmaker's supervisor and it was alleged in the Complaint that Hatmaker was well known in his department as a harasser and had harassed others in the past, employer liability should have been established (Pet. at C-3 and C-8).

In addition, Wallet, was alleged to have participated in the harassment with Hatmaker, thereby creating employer liability. (Pet at C-6). Therefore, if the motion to dismiss standard of review as set forth in *Conley* was properly applied to the allegations in Petitioner's Complaint, then the employer liability should have been established. This conclusion is supported by the decisions on the issue from the Ninth and Tenth Circuits. *EEOC v. Hacienda Hotel, 881, F.2d 1504 (9th* Cir. 1989) and *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572 (10th Cir. 1990).

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,
s/s Kelvin L. Boddie
Kelvin L. Boddie
Ohio Reg. #OO29696
120 W. Second St.
STE. 636
Dayton, Ohio 45402
(937) 461-1399

Counsel for Petitioner